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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

THE STATE OF IDAHO,

Petitioner,

v.

LORI KAY NEWSOM,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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March 16, 1999

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QUESTION PRESENTED

Given the bright-line rule of *New York v. Belton*, 453 U.S. 454 (1981) is a purse on the lap of a passenger seated in an automobile at the time the driver is arrested a "container" subject to search?

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PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

The State of Idaho respectfully petitions for a writ of certiorari to review the judgment of the Idaho Supreme Court in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court (Pet. App. 1-7) and the opinion of the Idaho Court of Appeals (Pet. App. 8-15) are unreported.

JURISDICTION

The Idaho Supreme Court entered its opinion on December 17, 1998 Pet. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTRODUCTION

This case raises an issue that may be greatly affected, if not resolved, by the decision that will be issued in *Wyoming v. Houghton*, No. 98-184 (U.S.) (argued on January 12, 1999). At issue in *Houghton* is whether, when police have probable cause to believe an automobile contains contraband, police may search a passenger's purse that rests in the passenger compartment of the automobile. At issue here is whether, when police are conducting a search incident to the arrest of a driver, police may search a passenger's purse that is in the passenger compartment of the automobile at the time of the arrest. In both cases, the lower court held that the police may not.

The most important similarity between the cases is that both involve whether an exception should be made to a bright-line rule established by this Court. In *United States v. Ross*, 456 U.S. 798, 825 (1982), the Court held that the scope of a search under the automobile exception to the warrant requirement includes "every part of the vehicle and its contents that may conceal the object of the search." Similarly, in *New York v. Belton*, 453 U.S. 454, 460 (1981), the Court held that, incident to an arrest of a driver, "the police may also examine the contents of any containers found within the passenger compartment." Although the rationales for the two bright-line rules are not identical, there is a close relationship between the questions of whether to carve out an exception to each of them for the purse of a passenger.

Accordingly, petitioner State of Idaho respectfully asks this Court to (1) grant its petition for a writ of

certiorari for full consideration by the Court, or (2) grant its petition, vacate the judgment below and remand the case to the Idaho Supreme Court for further consideration in light of the decision to be issued in *Houghton*, or (3) summarily reverse the judgment below.

STATEMENT

Newsom was a passenger in an automobile at the time the police arrested the driver of that automobile. An officer asked Newsom to step out of the automobile and then conducted a search of the automobile incident to the arrest of the driver. During that search the police found methamphetamine in a purse which had been on Newsom's lap at the time she was asked to step out of the automobile and which she left in the automobile at the request of the officer. After Newsom acknowledged ownership of the purse she was arrested.

Newsom was charged with felony possession of a controlled substance. She moved to suppress the methamphetamine. After a hearing, and without resolving the factual question as to whether Newsom voluntarily left her purse in the automobile when she got out, the trial court denied Newsom's motion to suppress. Newsom entered a conditional guilty plea, reserving her right to appeal the denial of her suppression motion. Pet. App. 3.

The Idaho Court of Appeals affirmed the denial of Newsom's motion to suppress and her conviction, explaining, "[a]t the time the driver was arrested, the purse, which later was determined to be Newsom's, was a container in the passenger compartment of the car.

Thus, under the bright-line rule of *Belton*, a search of Newsom's purse was within the scope of a search incident to arrest." Pet. App.13.

The Idaho Supreme Court granted Newsom's petition for review. The court reviewed the transcript of the motion to suppress and made the factual finding that Newsom had her purse on her lap at the time of the stop and the officer directed her to leave the purse in the automobile. Pet. App. 5. Citing no authority, the court held, "[i]n these circumstances, the passenger's purse was entitled to as much privacy and freedom from search and seizure as the passenger herself." Pet. App. 5. Again citing no authority, the court concluded that, "when the passenger left the automobile she was entitled to take her purse with her and was not required by *Belton* to leave it in the automobile for the first officer to search." Pet. App. 5.

Newsom's conviction, and the Idaho Court of Appeals opinion affirming that conviction, were ordered vacated and the case remanded.

REASONS FOR GRANTING THE PETITION

I. The Idaho Supreme Court's Decision that Newsom Had a Right to Take Her Purse From the Automobile to Prevent It From Being Searched Incident to the Driver's Arrest is Not Consistent With this Court's Decisions in *Chimel v. California* and *New York v. Belton*.

This Court has determined that "[a] single, familiar standard is essential to guide police officers, who have

only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-214 (1979). "[T]he protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *New York v. Belton*, 453 U.S. 454, 458 (1981). Based upon these precepts, this Court announced a bright-line rule that the passenger compartment of an automobile, and all containers therein, can be searched incident to the arrest of an occupant of an automobile. The State of Idaho submits that the Idaho Supreme Court did not follow this bright-line rule established by this Court in *Chimel v. California*, 395 U.S. 752 (1969), *rh'g denied*, and *New York v. Belton*, *supra*, when it held that the search of Newsom's purse, incident to the arrest of the driver of the automobile in which Newsom was a passenger, was not reasonable.

The genesis of the *Belton* bright-line rule authorizing the search of all containers found in the passenger compartment of an automobile was *Chimel v. California*, *supra*. As this Court explained in *Chimel*:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to

> prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

395 U.S. at 762-763.

Thereafter, in *Belton, supra,* realizing the need for a straightforward rule for determining the scope of a search of the interior of an automobile incident to a lawful custodial arrest of an occupant, this Court held "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460. This Court further explained, "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id.* at 460.

At the time of the stop of the automobile in which Newsom was riding, and at the time of the arrest of the driver, Newsom's purse was a container within the passenger compartment of the automobile. As such, at the time of the driver's arrest that purse was, pursuant to *Chimel* as interpreted in *Belton,* subject to search. Refusing

to apply the *Belton* bright-line rule, the Idaho Supreme Court carved out an exception, the extent of which is unclear, but which prohibits the search of a purse which was on the lap of the passenger to whom it belonged at the time of the arrest of the driver of the automobile.

Rather than having a "single, familiar standard" to guide police officers involved in the arrest – that all containers in the passenger compartment of an automobile may be searched incident to the arrest of an occupant of that automobile – the Idaho Supreme Court has attempted to create an exception to the rule this Court announced in *Belton*. Without citing any authority, the Idaho Supreme Court simply concluded that "when the passenger left the automobile she was entitled to take her purse with her and was not required by *Belton* to leave it in the vehicle for the first officer to search." Pet. App. 5.

In discussing search incident to arrest this Court recently explained:

> We have recognized that the first rationale – officer safety – is "both legitimate and weighty," *Maryland v. Wilson*, 519 U.S. 408, 412, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1997) (*per curiam*)). . . . In [U.S. v.] *Robinson* [414 U.S. 218 (1973)], we stated that a custodial arrest involves "danger to an officer" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." 414 U.S., at 234-235. We recognized that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and

> uncertainty, and not from the grounds for arrest." *Id.*, at 234, n.5.

Knowles v. Iowa, 119 S.Ct. 484, 487-488. This Court also recognized that the authority to conduct a full field search as incident to an arrest is a " 'bright-line rule,' which is based on the concern for officer safety and destruction or loss of evidence, but which does not depend in every case upon the existence of either concern." 119 S.Ct. at 488.

Because the Idaho Supreme Court has decided an important federal question inconsistent with this Court's decisions in *Chimel* and *Belton*, the State of Idaho respectfully requests that this Court issue a writ of certiorari.

II. A Split Exists In The Lower Courts As To Whether A Container Belonging To Someone Other Than The Arrestee And Located In The Passenger Compartment Of An Automobile At The Time Of The Arrest Is Subject To Search Under *Belton's* Bright-Line Search Incident To Arrest Rule.

Despite this Court's bright-line rule set forth in *Belton* – that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . [and] may also examine the contents of any containers found within the passenger compartment" – lower courts are not in agreement as to how this bright-line rule is to be applied.

In *People v. McMillon*, 892 P.2d 879 (Colo. 1993), the driver of the automobile in which McMillon was a passenger was arrested. McMillon complied with an officer's

request that she get out of the automobile. She left her purse on the front seat and it was searched incident to the arrest of the driver. Relying upon the reasoning of *Staten v. United States*, 562 A.2d 90 (D.C. 1989),[1] the Colorado Supreme Court upheld the search of McMillon's purse, explaining that "the logic of *Belton* applies with particular force to these facts." 892 P.2d at 884.

The North Dakota Supreme Court, in *State v. Gilberts*, 497 N.W.2d 93 (N.D. 1993), held that the search of a jacket belonging to Gilberts, an occupant of an automobile at the time the driver was arrested, was not authorized by *Belton*. Explaining that Gilberts was "merely a passenger in the vehicle," the court held that the driver's arrest was insufficient to justify the search of Gilberts' property. The

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[1] In upholding the search of the glove compartment of an automobile after an occupant, not the owner of the automobile, was arrested, the court in *Staten v. United States*, 562 A.2d 90 (D.C. 1989) explained:

> In circumstances where the police stop a vehicle with multiple passengers and arrest one of them, the need for the police to discover either hidden weapons which could be turned upon them or evidence which could be destroyed is no less acute simply because a person other than the arrestee owns the "container" in which those items might be located. In fact, because of the number of people involved, the need may be greater. Third-party ownership of the auto or "containers" therein would not necessarily prevent the arrestee from gaining access to those items. It should not, therefore, bar the police from searching them in the same manner as if they were owned by the arrestee.
>
> . . . [W]e think that the arrest justifies the reasonable infringement on any privacy interest that another passenger in the automobile may have in that container.

562 A.2d at 92.

court relied on the facts that the officers knew the jacket belonged to Gilberts and not the arrested driver and that the jacket "had been 'draped down around [Gilberts'] back' and that Gilberts was 'kind of sitting on it' " at the time he was ordered out of the automobile. 497 N.W.2d at 97. Reluctantly concurring, on the basis that Gilberts' jacket was "draped around his neck," Justice Vande Walle opined: "So much for the 'bright-line' test for determining the scope of a search of an automobile pursuant to a lawful custodial arrest as established by *New York v. Belton*." 497 N.W.2d at 99.

The difficulty lower courts are having in applying *Chimel* and *Belton* when the personal property of an occupant who is not arrested is searched is evident in the split which presently exists in the Washington intermediate appellate courts[2]. In *State v. Nelson*, 948 P.2d 1314 (Wash. Ct. App. 1997), after a passenger in the truck Nelson was driving was arrested, an officer ordered Nelson out of the truck and told her to leave her purse in the truck. The *Nelson* court affirmed the order suppressing the drugs found in Nelson's purse. Rather than applying the bright-line *Belton* rule that all containers within the passenger compartment of an automobile are subject to search incident to the arrest of an occupant, the court reasoned that "[w]hen the person maintains control over the personal property and there are no furtive movements indicating

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[2] The conflict within the lower appellate courts of Washington should soon be resolved. The Washington Supreme Court on September 23, 1998, heard argument after granting review of the decisions of the lower appellate courts in *State v. Hunnel*, 949 P.2d 847 (Wash. Ct. App. 1998) and *State v. Parker*, 944 P.2d 1081 (Wash. Ct. App. 1997).

he or she is trying to hide something, the police are not allowed to search the property." 948 P.2d at 1316.

On facts very similar to *Nelson*, the court in *State v. Hunnel*, 949 P.2d 847 (Wash. Ct. App. 1998), *review granted*, 960 P.2d 938 (Wash. 1998), upheld the search of Hunnel's purse after she was ordered to leave her purse in the automobile in which she was a passenger. The *Hunnel* court found that Hunnel's purse was a container within the passenger compartment of the automobile at the time an occupant was arrested. Pursuant to *Belton*, the officer's right to search arose at the time of the arrest. The officer's order that Hunnel leave her purse in the automobile "was lawful because the police had authority to search the purse under the 'bright-line' rule enunciated in *New York v. Belton*." 949 P.2d at 848.

Refusing to adopt the analysis of the court in *Nelson*, *supra*, the *Hunnel* court explained:

> *Belton* held that, for purposes of a workable "bright-line" rule, all containers within the passenger compartment of an automobile are accessible to an arrestee. (Citation omitted.) Thus, for purposes of a search incident to an arrest, all such containers are under the "control" of that arrestee. *Belton* did not require the police to ascertain that the arrestee be in actual control, either exclusive or joint, of a container before it could be searched. . . . To do so, would blur the "bright-line" rule, and return the police to "[w]eighing the totality of circumstances." . . . [E]ven a purse under the control of a non-arrested occupant of the car is, under the *Belton-Stroud* rationale, accessible to the arrested occupant for weapons or to hide evidence. Thus, we

> conclude that "control" is irrelevant to the issue of what is a searchable container under *Belton* and *Stroud* [720 P.2d 436 (1986)].
>
> We recognize that the "bright-line" rule encroaches upon the privacy rights of innocent passengers. But the Washington State Supreme Court has acknowledged that the privacy rights of such passengers must yield to the needs of law enforcement in car-stop situations. *State v. Kennedy*, 107 Wash.2d 1, 11-13, 726 P.2d 445 (1986).

949 P.2d at 850.

The California intermediate appellate courts have had no difficulty applying *Belton* to mean just what it says – any container in the passenger compartment of the vehicle at the time an occupant is arrested is subject to search. In *People v. Prance*, 277 Cal.Rptr. 567 (Cal. Ct. App. 1991) the search of the jacket and purse of an occupant, incident to the arrest of a different occupant, was upheld pursuant to *Chimel* and *Belton*. Explaining that nothing in *Chimel* and *Belton* requires that the containers searched must themselves be the arrestee's personal property, the *Prance* court held that the logic of *Belton* "applies with particular force" when the purse and jacket of another is "on the seat directly next to the arrestee, well within his easy reach, at a time when he was behaving suspiciously and trying to hide what he was doing." 277 Cal.Rptr. at 572. The court in *People v. Mitchell*, 42 Cal.Rptr.2d 537 (Cal. Ct. App. 1995), also relied upon *Staten v. United States*, 562 A.2d 90 (D.C. 1989), to uphold the search of the purse of an occupant, explaining:

> Adopting the result urged by the defendant would dim the luminosity of the Court's bright line. Officers would be challenged to discern whether individual containers might belong to someone other than the arrestee. Litigation would revolve around the location of containers, whether the items were more likely to belong to a person of one gender or another, claims of ownership given by arrestees or others with motives to be less than candid, and other such distinctions. Such fact-specific inquiries leave both citizen and officer with little or no guidance. It was to avoid these circumstances that the Supreme Court spoke with clarity. We decline to inject confusion into this body of law. We hold that a search incident to the arrest of an occupant of a vehicle extends to the passenger compartment of the vehicle and containers therein, including those possessed by nonarrested occupants.

People v. Mitchell, 42 Cal.Rptr.2d at 540.

The Florida appellate courts have also consistently upheld the search of the purse of a passenger located within the passenger compartment of an automobile at the time of the arrest of an occupant. *State v. Moore*, 619 So.2d 376 (Fla. Dist. Ct. App. 1993) (purse left in passenger compartment properly searched); *State v. Loftis*, 568 So.2d 121 (Fla. Dist. Ct. App. 1990) (search of nonarrested passenger's purse, left on floorboard on passenger's side permissible under *Belton*); *State v. Anders*, 407 So.2d 290 (Fla. Dist. Ct. App. 1981) (search of nonarrested passenger's purse, located under passenger's floor mat, permissible under *Belton*).

Other courts upholding the search of a container belonging to an occupant of an automobile other than the arrested occupant include *United States v. Mitchell*, 82 F.3d 146 (7th Cir. 1996) (search of all containers in van after arrest of passenger upheld); *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992) (search of purse of driver, incident to the arrest of passenger upheld under *Belton*); *Vega v. State*, No. A98A1879, 1999 WL 55495 (Ga. Ct. App. Feb. 9, 1999) (search of gym bag of non-arrested passenger complied with *Belton*); *State v. Hamdia*, 400 N.W.2d 484 (Wis. Ct. App. 1986) (lawful arrest of driver justifies infringement of any privacy interest which a non-arrested passenger may have).

By holding that when Newsom "left the vehicle she was entitled to take her purse with her" Pet. App. 5, the Idaho Supreme Court joined the ranks of courts refusing to apply the bright-line rule this court established in *Belton*.

CONCLUSION

The writ of certiorari should be issued and (1) full consideration by the Court given, or (2) the judgment below vacated and the case remanded to the Idaho Supreme Court for further consideration in light of the decision to be issued in *Houghton*, or (3) the judgment below be summarily reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 24697

STATE OF IDAHO, Plaintiff-Respondent, v. LORI KAY NEWSOM, Defendant-Appellant.	Boise, October 1998 Term 1998 Opinion No. 128 Filed: December 17, 1998 Frederick C. Lyon, Clerk

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada county. Hon. Robert M. Rowett, District Judge.

Appeal from denial of motion to suppress. *Vacated and remanded.*

Stewart A. Morris, Boise, for appellant.

Hon. Alan G. Lance, Attorney General; Michael A. Henderson, Deputy Attorney General, Boise, for respondent. Michael A. Henderson argued.

JOHNSON, Justice

This is a criminal case. We conclude that the search of a passenger's purse as part of a vehicle search following the arrest of the driver violated the passenger's right to be free from unreasonable search and seizure.

I.

THE BACKGROUND AND PRIOR PROCEEDINGS

Two Boise police officers (the officers) saw a vehicle that made several turn signal violations. The officers initiated a registration check and continued to watch the

vehicle while waiting for the results. The officers saw a passenger (the passenger) enter the vehicle and then saw the vehicle make more turn signal violations as it drove away. Through the registration check the officers learned that there were outstanding felony arrest warrants for the registered owner of the vehicle. The officers stopped the vehicle based on this information and the turn signal violations. Through an identification check the officers learned that the driver was not the owner of the vehicle and that there were outstanding felony arrest warrants for the driver. One of the officers (the first officer) arrested the driver. At that time, the passenger, Lori Kay Newsom, was sitting in the passenger seat of the vehicle. She later testified at a suppression hearing that her purse was in her lap at that time. The other officer (the second officer) asked the passenger to get out of the vehicle. According to the passenger's testimony at the suppression hearing, she began to get out of the vehicle while holding her purse but the second officer ordered her to leave her purse in the vehicle. During his testimony at the suppression hearing, the second officer was not asked whether he ordered the passenger to leave her purse in the vehicle. On this subject, his only testimony was that when the passenger stepped out of the vehicle, "[s]he didn't have a purse with her. It was inside the car." While the second officer questioned the passenger, the first officer searched the vehicle incident to the driver's arrest and found the passenger's purse. Inside the purse, the first officer found "a little blue change purse" that contained two glass vials and several tinfoil bindles of methamphetamine. After being questioned by the officers, the passenger admitted that the purse was hers.

The passenger was charged with felony possession of a controlled substance, pled not guilty, and requested that the trial court suppress the methamphetamine taken from her purse. Relying on *New York v. Belton*, 453 U.S. 454 (1981), the trial court denied suppression, stating that "it was a search incident to a valid arrest under the *Belton* case." The passenger requested that the trial court make factual findings. The trial court made only the following finding, which was prepared by the State at the request of the trial court:

> Having heard the testimony submitted at the Suppression Hearing from [the first and second officers], as well as the testimony of [the passenger], the Court finds that the officers[']actions were appropriate and that the search of [the passenger's] purse was lawful incident to the arrest of the driver of the vehicle.

The trial court did not make a finding about where the passenger's purse was at the time of the driver's arrest or whether the passenger's purse was left in the vehicle by the passenger voluntarily or at the second officer's direction.

The passenger entered a conditional guilty plea, reserving the right to appeal the denial of the suppression motion. The trial court accepted the conditional plea and entered a judgment of conviction. The passenger appealed. This Court assigned the case to the Court of Appeals, which ruled that the search was lawful. On the passenger's request, we granted review of the decision of the Court of Appeals.

II.

THE TRIAL COURT SHOULD NOT HAVE DENIED SUPPRESSION BASED ON *BELTON*.

The passenger asserts that the trial court should not have denied suppression based on *Belton*. We agree.

When we review a trial court's order denying a motion to suppress evidence on constitutional grounds, we defer to the trial court's factual findings unless they are clearly erroneous, and we freely review whether constitutional requirements have been satisfied in light of the facts found. *State v. Webb*, 130 Idaho 462, 465, 943 P.2d 52, 55 (1997). In the present case, the only findings to which we defer are those actually made by the trial court or any that are implicit in the trial court's decision. *State v. Kirkwood*, 111 Idaho 623, 625, 726 P.2d 735, 737 (1986).

In *Belton*, the United States Supreme Court announced the following rule:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed. . . .

453 U.S. at 460-61 (citations omitted).

Belton does not authorize the search of another occupant of the automobile merely because the other occupant was there when the arrest occurred. As the Supreme Court carefully pointed out in *Belton*, "the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." 453 U.S. at 461. Therefore, in the present case *Belton* does not authorize a search of the passenger based solely on the arrest of the driver.

The passenger testified at the suppression hearing that when the second officer asked her to step out of the vehicle: "I had my purse on my lap." There is no evidence in the record disputing this fact, nor is there any implicit finding of the trial court rejecting this testimony. In these circumstances, the passenger's purse was entitled to as much privacy and freedom from search and seizure as the passenger herself. The undisputed evidence is that the passenger did not leave the purse in the vehicle voluntarily. The only evidence in the record concerning this question is the passenger's testimony that the second officer directed her to leave her purse in the vehicle. The second officer's testimony did not contradict the passenger's testimony. The second officer testified only that the passenger left the vehicle without her purse. There is no explicit or implicit finding of the trial court rejecting the passenger's version. Indeed, the only indication of an implicit finding on this question is contained in a colloquy between the attorney for the passenger and the trial court in which the trial court appears to accept the passenger's version of this event. Therefore, we conclude that when the passenger left the vehicle she was entitled to take her purse with her and was not required by *Belton* to leave it in the vehicle for the first officer to search.

Based on *Belton,* the trial court should not have denied the passenger's request that the evidence taken from her "little blue change purse" be suppressed. Because the trial court focused only on the implications of *Belton,* we do not address any other basis upon which the evidence might be admissible.

III.

CONCLUSION

We vacate the trial court's denial of suppression of the evidence found in the passenger's purse.

We remand the case to the trial court for further proceedings.

Chief Justice TROUT and Justice Pro Tem WESTON, CONCUR.

Justice SCHROEDER, SPECIALLY CONCURRING

I concur in the Court's decision. However, the decision should not be read to restrict police from taking those steps necessary to assure their safety and the safety of others when dealing with a passenger in a vehicle in which the driver has been arrested. *See Terry v. Ohio,* 392 U.S. 1 (1968). This point was acknowledged by counsel for Newsom at the hearing on the motion to suppress:

> In this particular case, she started to get out of the car with the purse. They told her to leave the purse there. They knew they were going to search the car for weapons and contraband. So that's just a way of getting around it. *What they should have done as she started to get out with her purse, they should have stopped her right there, opened up the purse to see if there's weapons there,*

gave her her purse back and then questioned her. But they didn't do that because they know they're going to search the car for weapons and contraband. If they want to search the purse, all they've got to do is tell her to leave it behind. And they do that to try to get around the warrantless requirement.

So I don't think the court should fall for that. I mean, that's a trick as old as the ages. It's the procedure that's established. *But if they don't follow the correct procedure, that is, let her get out of the car with the purse – they offered no justification for her not doing that. And then they can look in the purse. If there is a weapon there, they can seize it.* But there is absolutely no reason for them to search the purse other than the fact that they told her to leave it behind in the car and then they searched the car, searched the purse, found the drugs. I think that's suppressible.

Justice SILAK CONCURS.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 23197

STATE OF IDAHO,	**1997 Opinion No. 92**
Plaintiff-Respondent,	**Filed: October 23, 1997**
v.	**Frederick C. Lyon, Clerk**
LORI KAY NEWSOM,	
Defendant-Appellant.	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada county. Hon. Robert M. Rowett, District Judge.

Judgment of conviction for possession of a controlled substance, *affirmed*.

Stewart A. Morris, Boise, for appellant.

Hon. Alan G. Lance, Attorney General; Michael A. Henderson, Deputy Attorney General, Boise, for respondent. Michael A. Henderson argued.

PERRY, Judge

Lori Kay Newsom was charged with one count of possession of a controlled substance. I.C. § 37-2732(c)(1). Newsom filed a motion to suppress evidence, which the district court denied following a hearing. Newsom entered a conditional plea of guilty and now appeals the district court's denial of her suppression motion. We affirm.

I.

FACTS AND PROCEDURE

On November 13, 1994, two Boise police officers stopped a car in which Newsom was a passenger. The officers arrested the driver after an identification check revealed that she had outstanding felony warrants. Newsom was in the passenger seat with her purse when the driver was arrested.

While one officer was arresting the driver, Newsom was asked to exit the vehicle by the other officer. According to Newsom, she attempted to exit the vehicle with her purse in hand but the officer instructed Newsom to leave her purse in the vehicle. According to the officer, Newsom exited the vehicle without her purse. While the officer questioned Newsom, the other officer was searching the vehicle incident to the driver's arrest and found a purse. Inside the purse the officer found a small blue coin purse, which contained methamphetamine. Newsom acknowledged that the purse belonged to her, and she was arrested.

Newsom was charged with possession of a controlled substance, a felony. Newsom pled not guilty and the matter was set for trial. Newsom filed a motion to suppress the methamphetamine found in her purse. Following a hearing at which Newsom and the two officers testified, the district court denied the suppression motion. The district court did not decide, however, the factual question of whether Newsom left her purse in the vehicle voluntarily or whether she left her purse in the vehicle because of the officer's instruction.

Newsom entered a conditional plea of guilty, reserving her right to challenge the denial of her suppression motion. Newsom appeals contending, as she did below, that the search of her purse was unreasonable under the Fourth Amendment to the United States Constitution.

II.

DISCUSSION

Newsom contends that the search of her purse was an unreasonable violation of her constitutional rights. Newsom argues that she had a possessory interest in her purse which created an expectation of privacy that was not overcome by the search incident to arrest exception to the warrant requirement. The district court found that the search was a lawful search incident to the arrest of the driver.

When a violation of a constitutional right is asserted through a motion to suppress, the appellate court should give deference to the trial court's factual findings unless those findings are clearly erroneous. *State v. Peightal*, 122 Idaho 5, 7, 830 P.2d 516, 518 (1992); *State v. Knapp*, 120 Idaho 343, 346, 815 P.2d 1083, 1086 (Ct. App. 1991). However, the appellate court exercises free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *Peightal*, 122 Idaho at 7, 830 P.2d at 518; *Knapp*, 120 Idaho at 346, 815 P.2d at 1086.

Had Newsom argued a violation under the Idaho Constitution, her attempt to have the methamphetamine

suppressed might have been successful. The Idaho Supreme Court has recently held:

> Under art. I, § 17 of the Idaho Constitution, the police may not search the passenger compartment of a vehicle incident to the valid arrest of the driver or passenger in that car, when the operator is removed from the vehicle.

State v. Charpentier, ___ Idaho ___, ___ P.2d ___ (No. 23417, slip op., Aug. 27, 1997), *petition for reh'g pending*. However, Newsom failed properly to raise this issue, either below or on appeal. Idaho Appellate Rule 35(a)(4) requires that the appellant's brief list the issues on appeal. An appellate court will not consider an alleged error if it was not raised as an issue on appeal. *State v. Raudebaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993). Where the issue is either addressed by the authorities cited or arguments in the briefs, this requirement has been relaxed. *Id.* Here, Newsom has not listed the Idaho Constitution and its protections in support of her issue or in her argument in her brief. Additionally, Newsom's cited authorities do not address the Idaho Constitution and any extra protection it may afford its citizens in the search incident to arrest situation. Because Newsom bases her issue and argument solely on federal law and on the Fourth Amendment to the United States Constitution, we are constrained to only address her argument on these grounds.[1]

---

[1] We acknowledge that following oral argument on August 12, 1997, and the Supreme Court's issuance of *Charpentier* on August 27, 1997, Newsom filed a "Motion to Augment Authorities and Arguments in Appellant's Brief" on September

Generally, a warrantless search is presumptively unreasonable and in violation of the Fourth Amendment proscription against unreasonable searches and seizures. *New York v. Belton*, 453 U.S. 454, 457 (1981). There are, however, a number of special and well-delineated exceptions to the warrant requirement. *State v. Curl*, 125 Idaho 224, 225, 869 P.2d 224, 225 (1993); *State v. McIntee*, 124 Idaho 803, 804, 864 P.2d 641, 642 (Ct. App. 1993). A search incident to a valid arrest is among those exceptions and, thus, does not violate the Fourth Amendment. *Chimel v. California*, 395 U.S. 752 (1969). Incident to a lawful custodial arrest, an officer, without a warrant and without probable cause, may search the area into which the arrestee might reach to grab weapons or evidentiary items. *Id.*, 395 U.S. at 762. This rule serves the dual purposes of ensuring officer safety and preventing the destruction of evidence. *Id.*

The search incident to arrest exception has been expanded so that when an officer makes a "lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, 453 U.S.

10, 1997. In the motion, Newsom sought to "augment her authorities with the *Charpentier* case, and to further argue that Article I, Section 17, of the Idaho Constitution, affords greater protection to [Newsom] than the Fourth Amendment of the United States Constitution, . . . [Newsom] requests that this Court grant leave to [Newsom] to augment her briefs and authorities by citing the *Charpentier* case and a brief written argument based thereon." By separate order this Court has denied Newsom's motion as an improper mechanism to present an issue or argument on appeal.

at 460 (footnote omitted). The police may also examine the contents of any containers, open or closed, found within the passenger compartment. *Id.* The justification for the search is not that the arrestee lacks a "privacy interest in the container, but that the lawful arrest justifies infringement of any privacy interest the arrestee may have." *Id.*

At the time the driver was arrested, the purse, which later was determined to be Newsom's, was a container in the passenger compartment of the car. Thus, under the bright-line rule of *Belton*, a search of Newsom's purse was within the scope of a search incident to arrest.

Newsom, however, contends the search should not extend to containers that belong to passengers when only the driver is arrested. Newsom argues that the search incident to arrest exception should not override the nonarrestee's privacy interest in the container.

Nothing in *Chimel* or *Belton* requires that the area and containers searched within the reach of the arrestee must be the personal property of the arrestee. *People v. Mitchell*, 42 Cal. Rptr. 2d 537, 539 (Cal. App. 1995). The vast majority of cases hold that all containers, including those of nonarrestees, are subject to search. *Mitchell*, 42 Cal. Rptr. 2d 537; *People v. McMillon*, 892 P.2d 879 (Colo. 1995); *State v. Moore*, 619 So. 2d 376 (Fla. Dist. Ct. App. 1993); *State v. Loftis*, 568 So. 2d 121 (Fla. Dist. Ct. App. 1990); *Staten v. United States*, 562 A.2d 90 (D.C. 1989); *but see State v. Gilberts*, 497 N.W.2d 93 (N.D. 1993).

The importance of the bright-line rule from *Belton* must be emphasized under these circumstances. When the police stop a vehicle with multiple passengers and

arrest one of them, the need for the police to discover either hidden weapons which could be used against them, or evidence which could be destroyed, is no less acute simply because a person other than the arrestee owns the container in which those items might be located. *Staten*, 562 A.2d at 92. The arrest justifies the reasonable infringement on any privacy interest another passenger in the automobile may have in that container. *Id.*

To hold as Newsom requests would place officers in grave danger, give criminals a safe-harbor for the concealment of weapons and contraband, and create confusion in an area where the United States Supreme Court has adhered to a bright-line rule. The effect of Newsom's request would allow an arrestee to place weapons or contraband in the containers of nonarrestee passengers where the item is beyond a search incident to a lawful arrest. In concluding that a nonarrestee's container may be searched, we remain consistent with the Supreme Court's bright-line rule contained in *Belton* which gives clear guidance to police officers. As the Court wrote: "In short, '[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' " *Belton*, 453 U.S. at 458, *quoting Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

We hold that under *Belton* a search incident to the lawful custodial arrest of one passenger extends to all containers within the passenger compartment of the vehicle, whether the container is owned by the arrestee or a nonarrestee. Therefore, the purse owned by Newsom, a

nonarrestee, was lawfully searched incident to the arrest of the driver and did not violate Newsom's Fourth Amendment rights pursuant to the United States Constitution as she argues on appeal.

Newsom also contends police should not be allowed to manipulate evidence by bringing it within the scope of a lawful search. Newsom testified at the hearing that the officer told her, as she tried to exit the vehicle with her purse, to leave the purse in the car. Even viewing the facts in the light most favorable to Newsom, her contention is without merit.

The police officer did not take the evidence and bring it within the scope of a lawful search. The purse was within the scope of a lawful search at the time of the driver's arrest; it was a container within the passenger compartment of the car. It was Newsom who tried to take the purse out of the car and beyond the scope of a search incident to arrest. Therefore, the officer's alleged instructions did not violate Newsom's constitutional rights.

III.

CONCLUSION

The district court did not err in denying Newsom's motion to suppress based upon her Fourth Amendment challenge. The judgment of conviction for possession of a controlled substance is affirmed.

Chief Judge LANSING and Acting Judge WALTERS, **CONCUR.**

Supreme Court, U.S.
FILED
MAY 6 1999
CLERK

(2)

No. 98-1485

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

THE STATE OF IDAHO,

Petitioner,

v.

LORI KAY NEWSOM,

Respondent.

On Petition for Writ of Certiorari
To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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May 6, 1999

2088

QUESTION PRESENTED FOR REVIEW

Does the search incident to arrest *bright-line rule*, established in *New York v. Belton,* authorize a warrantless search of the persons of vehicle occupants who are not arrestees?

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STATEMENT OF THE CASE

Respondent was a passenger in a motor vehicle that was stopped for a traffic infraction. The driver of the vehicle was arrested on an outstanding arrest warrant. At that time, Respondent was sitting in the passenger seat of the vehicle with her purse on her lap. An officer approached Respondent's side of the car, and asked her for identification, which she produced from her purse. That officer then asked the Respondent to exit the vehicle, and when she did, she attempted to take her purse with her. The officer ordered her to leave her purse in the car, and she complied with that request. The officer that arrested the driver of the vehicle, then searched the interior of the vehicle incident to the arrest of the driver, including the Respondent's purse which had been left in the car at the second officer's request. The first officer found a small coin purse inside the Respondent's purse, and, in turn, found methamphetamine inside the small coin purse. At the time of these events, the officers lacked probable cause to believe the Respondent and the driver of the vehicle, were engaged in criminal activity. They also lacked probable cause to believe that contraband or other evidence of criminal activity was in the vehicle.

The Respondent moved to suppress the methamphetamine found in her purse in the District Court, and the District Court denied that motion to suppress based upon *New York v. Belton*. The Respondent then appealed to the Idaho Court of Appeals, where the lower court's decision, was affirmed. The Idaho Supreme Court granted review, and reversed the Court of Appeals, holding that *Belton* did not apply. The case was remanded for further proceedings but

execution of the Court's opinion was stayed at Petitioner's request pending resolution of these proceedings.

INTRODUCTION

Petitioner seeks certiorari upon two grounds, (1) that the Idaho Supreme Court's decision in *Newsom* is not consistent with this Court's decisions in *Chimel v. California* and *New York v. Belton*, and, (2) that a split of authority exists in state courts of last resort with regard to the ruling in *Newsom*. Petitioner, in other words, is seeking review under Rule 10(b), upon the grounds that a State court of last resort has decided an important federal question in a way that conflicts with the *Belton* and *Chimel* decisions, and also that the *Newsom* decision conflicts with other state courts of last resort.

In this brief, Respondent will argue that neither of these propositions are true. The Idaho Supreme Court, in *Newsom*, has made a decision consistent with the *Belton* and *Chimel* decisions, and further, a review of the state court cases that Petitioner cites in its brief does not establish that the *Newsom* decision conflicts with decisions of other state courts of last resort.

THE IDAHO SUPREME COURT DECISION IN NEWSOM IS NOT INCONSISTENT WITH NEW YORK v. BELTON

The Idaho Supreme Court's decision in *Newsom* is not inconsistent with the *Belton* decision for the critical reasons that (a) Respondent was not an arrestee, and (b) her purse was actually a part of her person when it was seized from her and subsequently searched. Petitioner overlooks the fact that *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 2869 L.Ed.2d. 768 (1981) involves a case where all the occupants of the vehicle were arrestees. It is Respondent's contention that the bright-line rule embodied in *New York v. Belton*, does not apply to a search of non-arrestee passengers. The basis and justification for allowing the officers to search the contents of a vehicle from which an occupant has been arrested is of fundamental importance to the resolution of this case. The justification for the bright-line rule is set forth in *Belton*, at 453 U.S. at page 461:

> Such a container may, of course, be searched whether it is open or closed, since the justification is not that the arrestee has no privacy interest in the container, but the lawful custodial arrest justifies the infringement of any private interest the arrestee may have. (emphasis added).
>
> * * *
>
> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

The justification for allowing the search of containers in the vehicle is that this intrusion is minimal when considering the infringement of any privacy interests of the arrestee due to the arrest itself. Belton does not speak to the privacy interest of non-arrestees, such as the Respondent.

In this case, we are not dealing with the privacy interest of the arrestee. Instead, we are dealing with the privacy interest of a passenger in a vehicle which the arrestee was driving, and the search of the Respondent's purse, which was on her lap at the time she tried to exit the vehicle, and therefore a part of her person. The subsequent search of her purse, was, therefore, a search of her person. The bright-line rule embodied in *Belton* simply does not apply or authorize a search of non-arrestee passengers occupying the vehicle. In *U.S. v. Bell*, 762 F.2d 495 (6th Cir. 1985), the Sixth Circuit refused to extend *New York v. Belton* to the search of a passenger in a car driven by one who was arrested pursuant to a warrant. In that case, at fn. 5, the Court noted as follows:

> "The Fourth Amendment 'protects people, not places.' *Katz v. U.S.*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).
>
> "[M]ore particularly it protects people from unreasonable government intrusions into their legitimate expectations of privacy.
>
> * * *
>
> Because Bell was legitimately possessed of his own expectation of privacy, *Belton* and *Chimel* do not support the proposition that the search of the passenger compartment of an automobile authorized by *Belton* . . .

> extends to passengers in a car driven by one who is being arrested pursuant to a warrant."

Neither *Belton* nor *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1981), extend the scope of a search incident to an arrest to the search of a non-arrestee's person who may be in the immediate area. At page 6 of the Petition, Petitioner argues that Respondent's purse was a container within the passenger compartment of the automobile, therefore subject to a search incident to the arrest of the driver under Belton. However, this is a mischaracterization, since the purse at the time of the driver's arrest, was on Respondent's lap, and she attempted to take it when she exited the vehicle. The purse, at that time, was actually a part of her person, not just a container in the vehicle which was being searched. That being so, the officers cannot manipulate the purse to a status of simply being a container in the vehicle by ordering the Respondent to leave the purse in her car. This would be similar to the incidences which were not permitted in *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 622 L.Ed.2d 238, rehearing denied, 44 U.S. 1049, 62 L.Ed.2d 737, 100 S.Ct. 741 (1979), *U.S. v. DiRe*, 332 U.S. 581, 92 L.Ed. 210 (1948), and *U.S. v. Perea,* 996 F.2d 633 (2d Cir. 1963). As stated in Perea, supra, at page 643:

> "Further, arresting agents are not allowed to simulate circumstances warranting application of the incident – to – arrest exception merely by bringing the item they wish to search into the area near the person arrested, or vice versa."

The Idaho Supreme Court has not carved out an exception to the *Belton* rule, as Petitioner argues. Rather, it has

simply stated that *Belton* does not apply, since *Belton* does not authorize searches of non-arrestees.

It should be kept in mind that in this case, there was no apparent ongoing criminal activity by either the driver of the vehicle, or by the Respondent herself. The car was pulled over for failure to signal. The driver was arrested for an outstanding warrant. The search was conducted after both occupants were out of the car. The search of the vehicle could not be justified in an effort to secure evidence or any other criminal activity being perpetrated by a driver because she was stopped for not signaling and arrested on a warrant. Any concerns for officer safety, therefore, could be adequately addressed by the principals set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The Idaho Supreme Court's ruling in *Newsom* does not establish a different rule from *Belton* that would be hard to follow by officers in the field. The *Newsom* decision does not alter the rule. Under *Newsom*, the rule remains that the search-incident-to-an-arrest exception does not authorize a search of persons who are not arrestees. Any patdown or search for weapons of nearby non-arrestees, is therefore governed by the existing principals under *Terry v. Ohio* and the *Chimel* case. *Chimel* authorizes a search incident to an arrest of the lunge area of the arrestee. Again, the *Newsom* decision does nothing to alter this rule. Officers in the field will still know that they cannot search the persons of people who are not under arrest under the *Belton* case, and, if they have concern for their safety with regard to a non-arrestee, they can pat down that person, and, if justified, search the person for weapons. If probable cause develops from the pat down, the officer can arrest the

person. These principals are not altered by the *Newsom* decision.

Petitioner's anticipated reliance upon *Wyoming v. Houghton*, S.Ct. 98-184, decided April 5, 1995, is not well placed. The *Houghton* decision is an automobile exception case based upon probable cause to believe controlled substances were located in the vehicle that was searched. The rationale of this case was essentially based upon the justification for the search a motor vehicle when there is probable cause to believe that controlled substances will be found therein, set forth in *U.S. v. Ross*, 456 U.S. 798, at p. 806 (1982). However, as the Court pointed out in *Houghton*, the justification for a search of containers under the automobile exception (probable cause) is different than the justification set forth in *Belton*. The Court in *Houghton* summarized the justification for the exception to the warrant requirement in the automobile exception (citing *Ross*) as follows:

> *Ross* summarized its holding as follows: "If probable cause justifies a search of a lawfully stopped vehicle, it justifies the search of *every part of the vehicle and its contents* that may conceal the object of the search." *Id* at 825 (emphasis added).

As previously mentioned, the justification for the search incident to an arrest exception set forth in *Belton*, is different. The justification for the search in *Belton* situations, is that the infringement upon the arrestee's privacy rights are made minimal by the fact that he has been arrested himself. Thus, the *Belton* exception refers only to a permissible invasion of the arrestee's privacy rights, not those of non-arrestees. The rationale under *Ross*, when there is probable cause to believe

there are controlled substances in the vehicle, is that probable cause already exists to justify the search of a lawfully stopped vehicle and the justification extends to every part of the vehicle and its contents.

Conceivably, under *Ross*, a passenger could be ordered to leave a personal item in the car because probable cause already exists to search the entire contents of that car. However, when there is no probable cause to search the car, a search of the person of non-arrestees would not be within the scope of that search. The scope of that search appears not to include the persons of non-arrestees even if there is probable cause. The *Houghton* court distinguished between the search of containers authorized by its decision, as opposed to the search of persons by the following statement:

> "In this regard -- the degree of intrusiveness upon personal privacy and indeed even personal dignity -- the two cases the Wyoming Supreme Court found dispositive differs substantially from the package and search at issue here. *U.S. v. Di Re* 332 U.S. 58(1948), held that probable cause to search a car did not justify a body search of a passenger. And *Ybarra v. Illinois*, 444 U.S. 85(1979), held that a search warrant for a tavern and its bartender did not permit body searches of all the bar's patrons. These cases turned upon the unique, significantly heightened protection afforded against searches of one's person. 'Even a limited search of the outer clothing . . . constitutes as a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.' *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). Such traumatic consequences are not to be

expected when the police examine an item of personal property found in the car."

Justice Breyer, in his concurring opinion, amplified upon this distinction by stating as follows:

> 'At the same time, I would point out certain limitations upon the scope of the bright-line rule that the court describes. Obviously, the rule applies only to automobile searches. Equally obviously, the rule applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile.' (emphasis added).
>
> * * *
>
> Less obviously, but in my view also important, is that the container here at issue, a woman's purse, was found at a considerable distance from its owner, who did not claim ownership until the officer discovered her identification while looking through it. Purses are special containers. They are repositories of especially personal items that people generally like to keep with them at all times. So I am tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this court's prior cases, I cannot argue that the fact that the container was a purse *automatically* makes a legal difference, for the court has warned against trying to make that kind of distinction. *U.S. v. Ross, supra*, at 822. But I can say that it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of "outer clothing," *Terry v. Ohio,*

> *supra*, at 24, which under the court's cases, would properly receive increased protection. . . . In this case, the purse was separate from the person, and no one has claimed that, under those circumstances, the type of container makes a difference. (emphasis added).

Respondent submits that the critical distinction in this case is the fact that Respondent's purse, being on her lap at the time of the arrest, and being removed from her person only at the direction of the police officer, was a part of her person at the time of its search. The purse, being a part of a non-arrestee's person, does not, therefore, come within the scope of a search incident to an arrest under the *Belton* bright-line rule. Since there was no probable cause to search the vehicle, it does not, therefore, come within the bright-line rule of *Wyoming v. Houghton*, *supra*, or *U.S. v. Ross, supra*.

THE IDAHO SUPREME COURT HAS NOT DECIDED AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

The second reason Petitioner urges this Court for a writ of certiorari is that a split exists in the lower courts as to whether a container belonging to someone other than the arrestee is subject to a search under *Belton's* bright-line rule. Interestingly, the Idaho Court of Appeals, which sided with petitioner, but was reversed by the Idaho Supreme Court, held that "the vast majority of cases hold that all containers, including those of non-arrestees, are subject to search." Appendix to Petition for Writ of Certiorari, p. 13. Respondent submits that an analysis of the cases cited by Petitioner in

support of this split of authority, reveals that the cases do not establish that the Idaho Supreme Court has decided an important federal question in a way that conflicts with decisions of other state courts of last resort.

A number of the cases cited by Petitioner are distinguishable in that they did not involve a situation where a non-arrestee occupant of the vehicle had the personal property on his person before being told to leave the property in the vehicle. In *People v. Mitchell*, 42 Cal.Rptr. 537, 539 (Cal.App. 1995), the Court, for its authority, relied on pure dicta set forth in *U.S. v. Vaughn*, 718 F.2d 332 (9th Cir. 1993). This is pointed out concisely in the dissenting opinion of Justice White in *People v. Prance*, 226 Cal.App.3d 1525, 227 Cal.Rptr., at p.573 (Cal.Ct.App. 1991). In *People v. McMillan*, 892 P.2d 879 (Colo. 1995), the Appellant in that case left her purse "voluntarily" in the car. *State v. Moore*, 619 So.2d 376 (Fla.Dist.Ct.App. 1993) does not indicate whether or not the defendant was told to leave the purse in the car. And, *Staten v. U.S.*, 526 Atl.2d 90 (D.C. 1989) is distinguishable because it involves a search of the glove box of the vehicle, which was owned by a non-arrestee occupant of the car at the time the driver was arrested. These cases are not inconsistent with the *Newsom* decision, because none of them specifically involved the search of a non-arrestee's purse that was in her possession at the time another occupant of the vehicle was arrested.

State v. Loftis, 568 So.2d 121 (Fla.App. 5 Dist., 1990) does not specifically indicate whether the purse that was searched incident to the arrest of the driver of the automobile was in the possession of the passenger at the time of the arrest. In fact, the court indicated that the purse was located on the

front floorboard on the passenger side of the vehicle at the time, and was within the driver-arrestee's immediate control.

In *State v. Anders*, 497 So.2d 290 (Fla.App. 1981), Anders was asked out of the car after the driver was arrested for a DUI. The driver was wearing a black gun holster with a knife in it when he was arrested, creating concern on the part of the officers that there possibly could be a weapon in the vehicle. Anders' purse was found under the floor mat on the passenger side of the vehicle when it was searched incident to the driver's arrest. There is no indication that the purse was in Anders' possession.

In *U.S. v. Mitchell*, 82 F.3d 146 (7th Cir. 1996), a gun was found in a cardboard box between the two front seats after both Mitchell and the other occupant were arrested. The search in this case was upheld for the primary reason that Mitchell consented twice to the search of his van. In pure dicta, the Court proffered an alternate theory justifying the seizure of the gun, that is, that it would be valid based upon the search incident to the arrest of the passenger. The rule in this case is not inconsistent with *Belton*, nor is it at odds with the rule announced in the *Newsom* decision.

In *People v. Bullock*, 45 N.W.2d 866 (Mich. 1992), all three occupants of the vehicle, including Bullock, were arrested. Because the driver's arrest, at least, was unquestionably valid, they upheld the search resulting in the seizure of Bullock's purse, as valid incident to the arrest of the driver. However, it should be noted that again, the purse was not in Bullock's possession, but was found in the glove box of the vehicle. In this case, Bullock was an arrestee, although the validity of her arrest was not decided. Significantly, the purse

that was seized incident to the arrest of the driver, was not in her possession at the time. This case, therefore, does not involve the search of a person of a non-arrestee, and is therefore not inconsistent with *Belton*, and is distinguishable from the *Newsom* decision.

In *Vega v. State*, 512 S.E.2d 65 (Ct.App. GA. 1999), W.L. 55495, the search of Vega's gym bag found in the vehicle incident to the arrest of the driver, was upheld under *Belton* as a search incident to the arrest of the driver. Vega was not an arrestee, however, the black gym bag was located in the car's rear passenger seat, and there is no indication that it was in Vega's possession at the time the driver was arrested.

State v. Hamdia, 400 N.W.2d 485 (Wis. App. 1986) is distinguishable because Hamdia exited the automobile at an officer's request and then left the scene on foot. He later arrived at the police station to post bond for the driver. After Hamdia left the scene, the police searched the automobile and found weapons and a controlled substance. There is no indication where these items were found in the automobile or whether they were in Hamdia's possession before he exited the vehicle.

Finally, Petitioner cites several cases from the State of Washington in support of its proposition that there is a split of authority on this issue. The first case is *State v. Nelson*, 948 P.2d 1314 (Wash.Ct.App. 1997). This case is indistinguishable from the *Newsom* decision, and not inconsistent with *Belton*. In that case, Nelson, after one of the passengers was arrested, was ordered by an officer to get out of the truck and also ordered to leave her purse, which was between her legs at the

time. Nelson was a non-arrestee. The Washington Court of Appeals stated at 948 P.2d p.1316:

> "Thus, if the police do not believe a person presents a danger, they cannot search the person and their clothing. This would include a purse that they are carrying."

This case, as the *Newsom* decision, is outside of the scope of *Belton*, because it involves a non-arrestee and her person was searched. Both *Nelson* and *Newsom* are consistent with each other and not in conflict with *Belton*.

The other two Washington cases cited by Petitioner, do not assist Petitioner's cause. These cases are *State v. Parker*, 944 P.2d 1081 (Wash.App.Div. 3, 1997) and *State v. Hunnel*, 949 P.2d 847 (Wash.App.Div. 2, 1998). Petitioner submits that the *Parker* case is consistent with *Newsom*, because the defendant in that case voluntarily exited her car to take a breath test, and left her purse in the car. There was no evidence that the purse was on her person at the time she was asked to exit the vehicle, or that she attempted to remove it from the vehicle. *State v. Hunnel*, the respondent concedes is inconsistent with the *Newsom* decision. However, both of these cases are not decisions by a state court of last resort, since they are both on review to the Washington Supreme Court, as indicated by Petitioner in footnote 2 of the Petition. (Oral argument was heard on September 23, 1998.) In a telephone call to the Clerk of the Washington State Supreme Court on May 4, 1999, counsel for Respondent was informed that this case is still under advisement. None of the Washington cases cited by Petitioner, therefore, supports his proposition as to a split of authority.

CONCLUSION

The Idaho Supreme Court's decision in *Newsom* is not inconsistent with the U.S. Supreme Court's decisions in *Chimel* and *Belton*. Neither of these cases hold that the person of a non-arrestee may be searched incident to the arrest of another occupant of a motor vehicle. The cases that Petitioner cites do not establish that there is a split of authority among state courts of last resort on an important federal question. This case does not involve an important federal question or a decision that in any way conflicts with the decisions of the United States Supreme Court, nor with decisions of courts of last resorts of other states. The Petition for Writ of Certiorari should be denied.

DATED May 6, 1999.

Respectfully submittted,

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